DE: 4410-BB

DEPARTMENT OF JUSTICE

[Docket No. OLP 173]

Request for Information Regarding the Use of Pentobarbital in Federal Executions

AGENCY: Office of Legal Policy, Department of Justice.

ACTION: Request for information.

SUMMARY: The Department of Justice is seeking comments from the public regarding the risk of pain and suffering associated with the use of pentobarbital sodium ("pentobarbital"), and any other relevant portion of the Bureau of Prisons' 2019 Addendum to the Federal Execution Protocol.

DATES: Electronic comments must be submitted, and written comments must be postmarked, on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Docket No. OLP 173 , through the Federal eRulemaking Portal: *www.regulations.gov*. Follow the instructions for submitting comments.

- *Postal Mail or Commercial Delivery:* If you do not have internet access or electronic submission is not possible, you may mail written comments to Docket Clerk, Office of Legal Policy, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington DC, 20530. To ensure proper handling, please reference the agency name and Docket No. OLP 173 on your correspondence.
- *Please note that comments submitted by email or fax may not be reviewed by DOJ.*

Privacy Note: The Justice Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: Robert Hinchman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice, (202) 514-8059 (this is not a toll-free number). If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), please call the toll-free Federal Information Relay Service (FIRS) at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to comment on this notice by submitting written data, views, or arguments.

II. Background

On July 1, 2021, Attorney General Merrick Garland issued a memorandum imposing a moratorium on all federal executions pending a review of certain policies and procedures. *See* Memorandum from the Attorney General, *Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021), *available at* https://www.justice.gov/opa/page/file/1408636/download. In the memorandum, the Attorney General stated that "[s]erious concerns have been raised about the continued use of the death penalty across the country, including arbitrariness in its application, disparate impact on people of color, and the troubling number of exonerations in capital and other serious cases." *Id*.

In the two years preceding the issuance of the moratorium, the Justice Department made a series of changes to its policies and procedures governing capital sentences and carried out the first federal executions in nearly two decades between July 2020 and January 2021. *Id.* "To ensure that the Department's policies and procedures are consistent with the principles articulated in [the] memorandum," Attorney General Garland directed the Deputy Attorney General to undertake and supervise reviews concerning both the method and manner of federal executions and the policies and procedures governing all federal cases in which a defendant is charged, or could be charged, with an offense subject to the death penalty. The subject of this Request for Information concerns the method of execution. *Id*.

A. State Lethal Injection Protocols

Almost all states that currently permit the death penalty allow for lethal injections as their primary method of execution (South Carolina is an exception, having established electrocution as the primary method of execution).[1] State protocols concerning the use of lethal injection vary; they consist of one-, two-, and three-drug methods. The three-drug protocol used by the states typically involves an anesthetic or sedative, followed by pancuronium bromide to stop breathing and paralyze the inmate, and finally potassium chloride to stop the inmate's heart. The one- or two-drug protocols typically use a lethal dose of an anesthetic or sedative.[2]

There has been much litigation regarding death penalty protocols. In *Baze v. Rees*, 553 U.S. 35 (2008), the Supreme Court upheld Kentucky's use of a three-drug combination, including sodium pentothal (also called sodium thiopental), which induces unconsciousness; pancuronium bromide; and potassium chloride. However, practical obstacles soon emerged as pharmaceutical companies began refusing to supply the drugs used to implement the death sentences. *See Glossip v. Gross*, 576 U.S. 863, 869-70 (2015). In particular, the sole American manufacturer of sodium pentothal stopped producing the drug because of its use in the death penalty.[3]

After the availability of sodium pentothal declined, several states developed an alternative drug combination that replaced sodium pentothal with pentobarbital. *Glossip*, 576 U.S. at 870. Georgia, Idaho, Missouri, South Dakota, and Texas administer a single-drug pentobarbital protocol as the primary method of execution.[4]

B. Federal Death Penalty Legal Framework and Practice

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[1] Death Penalty Information Center, *Methods of Execution*, https://deathpenaltyinfo.org/executions/methods-of-execution.
[2] Death Penalty Information Center, *State by State Lethal Injection*, https://deathpenaltyinfo.org/state-lethal-injection.
[3] Press Release, Hospira, STATEMENT FROM HOSPIRA Regarding its halt of production of Pentothal™ (sodium thiopental) (Jan. 21, 2011), https://files.deathpenaltyinfo.org/legacy/documents/HospiraJan2011.pdf.
[4] Death Penalty Information Center, *State by State Lethal Injection*, https://deathpenaltyinfo.org/state-lethal-injection.

Implementation of the federal death penalty is governed by 18 U.S.C. 3596-3597. These provisions require the federal government to carry out death sentences "in the manner prescribed by the law of the State in which the sentence is imposed." 18 U.S.C. 3596(a). Federal regulations further clarify that executions must be conducted by "intravenous injection of a lethal substance or substances in a quantity sufficient to cause death, such substance or substances to be determined by the Director of the Federal Bureau of Prisons, or by any other manner prescribed by the law of the State in which the sentence was imposed or which has been designated by a court in accordance with 18 U.S.C. 3596(a)." 28 CFR 26.3(a)(4).

In 2004, the federal government issued a 50-page "BOP Execution Protocol," which outlined the Bureau of Prisons' execution procedures. *See* BOP Execution Protocol Manual (2004). The protocol provided that execution would occur using lethal injection but did not specify the type of drugs to be used. *Id*. at pp. 7, 10. That being said, for the three federal executions conducted between 2001 and 2003, the Bureau of Prisons used a combination of sodium pentothal, pancuronium bromide, and potassium chloride. *See In re Federal Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 110 (D.C. Cir. 2020).

In 2007 and 2008, the government issued two three-page addenda to the 2004 BOP Execution Protocol. The 2008 Addendum memorialized the Bureau of Prisons' use of those three substances in federal executions. *See* Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures (Effective August 1, 2008). In 2011, the Department of Justice announced that the Bureau of Prisons did not have the drugs it needed to implement the 2008 Addendum. However, no executions had been conducted since 2003, in part because of the unavailability of sodium pentothal.[5]

C. 2019 Addendum to the Federal Execution Protocol

[5] *See* Letter from Office of Attorney General to National Association of Attorneys General (Mar. 4, 2011), available at http://cdn.ca9.uscourts.gov/datastore/general/2011/11/15/11-35940_EOR_VOL_5.pdf (at 000678).

In July 2019, the then-Attorney General directed the Bureau of Prisons to adopt an Addendum to the Federal Execution Protocol that provided for the use of a single drug, pentobarbital. *See* Press Release, Department of Justice, Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse; Memorandum for the Attorney General, *The Federal Bureau of Prisons' Federal Execution Protocol Addendum* (July 24, 2019); Memorandum for the Attorney General, *Summary of the Federal Bureau of Prisons' Federal Execution Protocol Addendum* (July 24, 2019); *see also* Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures (Effective July 25, 2019), *available at* https://www.supremecourt.gov/DocketPDF/19/19-1348/145068/20200605210117775_2020%2006%2005%20Appendix.pdf (at 210a).

The Bureau of Prisons indicated in a memorandum to the then-Attorney General that it had a "viable domestic source" to obtain pentobarbital and that the manufacturer is properly registered as a bulk manufacturer of pentobarbital. *See* Memorandum for the Attorney General, *Summary of the Federal Bureau of Prisons' Federal Execution Protocol Addendum* (July 24, 2019). The Bureau of Prisons also "secured a compounding pharmacy to store the [active pharmaceutical ingredient] and to convert the [active pharmaceutical ingredient] into injectable form as needed." *Id*.

The 2019 Addendum, like at least one previous addendum, asserts that the "identities of personnel considered for and/or selected to perform death sentence related functions . . . shall be protected from disclosure to the fullest extent permitted by law." Addendum to BOP Execution Protocol: Federal Death Sentence Implementation Procedures (Effective July 25, 2019). The 2019 Addendum also specifies other details such as defining the "qualified personnel" who can serve as the executioner(s); the number of rehearsals that non-medically licensed or certified qualified personnel must participate in prior to participating in an actual execution; dosage;

identification of appropriate injection sites; the number of backup syringes; and how and when the condemned individual should be escorted into the room, restrained, and monitored. *Id*.

From July 2020 to January 2021, the federal government executed thirteen death row inmates pursuant to the 2019 Addendum.

D. 2021 Moratorium on Federal Executions Pending Review of Policies and Procedures

As noted above, the Attorney General issued a moratorium on federal execution during the pendency of three reviews. The first, and the subject of this Request for Information, is a review to "assess the risk of pain and suffering associated with the use of pentobarbital." The review may also "address any other relevant portion" of the 2019 Addendum. *See* Memorandum from the Attorney General, *Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021).

As noted in the Attorney General's memorandum, although some medical experts have concluded that the use of pentobarbital may risk inflicting painful pulmonary edema, the Supreme Court found that this risk was insufficient "to justify last-minute intervention by a Federal Court" shortly before an execution was scheduled to occur. *Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020) (per curiam). However, "[a] risk need not meet the Court's high threshold for such relief, or violate the Eighth Amendment, to raise important questions about our responsibility to treat individuals humanely and avoid unnecessary pain and suffering." Memorandum from the Attorney General, *Moratorium on Federal Executions Pending Review of Policies and Procedures* (July 1, 2021). To ensure that these considerations are taken into account, the Attorney General ordered this review.

III. Solicitation of Comments

The Department of Justice requests information from individuals or organizations regarding the risk of pain and suffering associated with the use of pentobarbital and any other relevant portion of the 2019 Addendum. To contribute effectively to this review, all commenters are encouraged to provide comments that are responsive specifically to the topics of this review.

Dated: September 21, 2022.

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Office of Legal Policy.
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